85-1873 (1)

Supreme Court, U.S.
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No.:

WARD TRUMAN JONES,
JESSIE THOMAS JONES,
JOE B. BLEDSOE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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23 pp

Petitioners, Ward Truman Jones, Jessie Thomas Jones, and Joe B. Bledsoe, respectfully pray that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on January 28, 1986.

QUESTIONS PRESENTED FOR REVIEW

1. Whether 18 U.S.C. 371 was unconstitutionally applied to the Defendants in that they were convicted for exercising their rights under the First Amendment to the United States Constitution in the promotion and sale of living trusts.

2. Whether 26 U.S.C. 7206(2) was unconstitutionally applied to the Defendants in that they were convicted for exercising their rights under the First Amendment to the United States Constitution in the accounting service and advice they provided their clients.

3. Whether the Defendants were deprived of their liberty without due process of law as guaranteed under the Fifth and Fourteenth Amendments of the United States Constitution in the trial court's refusal to permit the Defendants to present the testimony of an expert witness knowledgeable on the status of living trusts and the unsettled nature of the law regarding them insofar as the tax treatment of them was concerned.

PARTIES BELOW

All parties appear in the caption of the case.

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JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Fifth Circuit was rendered on January 28, 1986. Petitioners' Petition for Rehearing was denied on February 26, 1986, and filed of record on February 28, 1986. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States,

Amendment I:

> "Congress shall make no law... abridging the freedom of speech..."

Constitution of the United States,

Amendment V:

> "No person shall... be deprived of life, liberty, or property, without due process of law..."

Constitution of the United States,

Amendment XIV, Section 1:

> "... nor shall any state deprive any person of life, liberty, or property without due process of law..."

STATEMENT OF THE CASE

The Petitioners were indicted in a sixteen count indictment charging one count of conspiracy to defraud the United States by impeding, impairing, obstructing, and defeating the lawful functions of the Department of the Treasury in the collection of revenues, in violation of 18 U.S.C. 371; fourteen counts of violating 26 U.S.C. 7206(2); wilfully preparing and presenting false and fraudulent income tax returns to the Internal Revenue Service; and one count wherein the Petitioner, Ward Truman Jones, was charged with violating 18 U.S.C. 401(3), criminal contempt of court.

At the conclusion of the trial, the jury returned a verdict finding the Petitioner, Ward Truman Jones, guilty on all sixteen counts; the Petitioner, Jessie Thomas Jones, guilty on counts

I, and X; and the Petitioner, Joe B. Bledsoe, guilty on all counts except counts V, VI, X, XI, and XVI.

The government's evidence attempted to show that the Petitioners had entered into a conspiracy to defraud the government by impeding, impairing, obstructing, and defeating the Internal Revenue Service in the collection of income taxes. Specifically, according to the government, the Petitioners and their company, Alpha Financial Enterprises, herein referred to as A.F.E., promoted and sold certain trusts known as living trusts, or intervivos trusts, and related tax advice with the intent to defraud the United States Treasury Department. It was the government's position that those individuals who purchased these living trusts from the Petitioners and relied upon the trust documents and tax advice provided to

them by the Petitioners and A.F.E. created false deductions which substantially reduced those individual's taxable income. It was these alleged false deductions that were taken by individual clients of the Petitioners and A.F.E. that formed the basis of counts II through XV.

The Petitioners' position is as follows: As far back as 1974, four years before the Petitioner, Ward Truman Jones, began A.F.E., said Petitioner purchased a trust similar to the ones that his company provided for others, that Ward Truman Jones filed income tax returns with the Internal Revenue Service using the trust benefits for four years, and had never had a problem with the Internal Revenue Service regarding his return. Similarly, the Petitioners, Jessie Thomas Jones, and Joe B. Bledsoe, reported their income in

the same manner through the use of living trusts. It is the position of the Petitioners that they devoted many years of legal research, had had legal and accounting advice from attorneys and accountants, and, based upon their personal experience through contacts with Internal Revenue Service agents and employees, that the living trusts they espoused were proper and legal. It was further the Petitioners' position that they and A.F.E. advocated positions regarding living trusts in the income tax system which they had a good faith belief were lawful. Petitioners also provided tax advice to their clients across the country consistent with the living trust information and positions they advocated. Finally, it was the Petitioners' position that no court had ever made an interpretation regarding the legality insofar as tax consequences are concerned of this

type of trust that the Petitioners and A.F.E. assisted individuals in forming. The Petitioners attempted to introduce the testimony of an expert witness who was an attorney experienced in the area of intervivos living trusts and the unsettled status of the law insofar as the tax consequences of using intervivos living trusts. The trial court refused to permit this witness to testify, although Internal Revenue Service agents were permitted to testify regarding their opinions of the legality of trusts espoused by the Petitioners.

REASONS FOR GRANTING THE WRIT

1. The decision below directly conflicts with the holdings in other circuits protecting the First Amendment rights of citizens to advocate certain tax shelters in areas of unsettled law.

The Fourth Circuit case of United States v. Mallas, 762 F2d 361, and the

Ninth Circuit decision in United States v. Dahlstrom, 713 F2d 1423, both protected the rights of citizens under the First Amendment to the United States Constitution to advocate tax shelter programs in areas where the law was vague or unsettled. In both those cases individuals were prosecuted similarly to the Petitioners herein for the advocacy of certain tax shelters. The Dahlstrom case specifically addressed the question of trusts, although in that case it dealt with foreign trusts. It is the Petitioners' position in this matter, as it was Dahlstrom's position, that on the dates alleged in the indictment, there was no statute that expressly made intervivos living trusts illegal, (which were the type of tax shelters promoted by the Petitioners) nor was there any case law that held that the trusts advocated by the Petitioners lacked economic

substance for tax purposes. These Petitioners advocate that they did not have "fair notice" that their conduct was illegal. Due process of law requires that a person be given fair notice as to what constitutes illegal conduct so that he may conform his conduct to the requisites of the law. Consequently, where the Petitioners herein were not given fair notice of the requisites of the law, the Petitioners necessarily lacked the requisite intent to violate the law.

The Petitioners relied upon their First Amendment rights of free speech to advocate the intervivos living trusts as a legitimate means of tax avoidance, and raised before the Court of Appeals their protection under the precedent of Brandenburg v. Ohio, 395 U.S. 444.

The Fifth Circuit Court of Appeals rejected Petitioners First Amendment

arguments and two-part Brandenburg test as "frivolous". However, the other Circuits cited above recognized the legitimacy of First Amendment protection to individuals advocating certain tax shelter proposals.

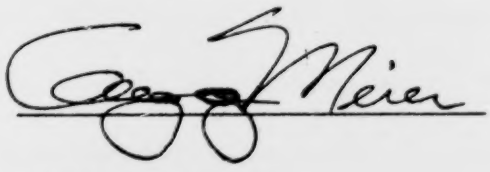
Finally, the Circuit Court opinion cited above reflects the Court's recognition that vague, unsettled, and highly debatable areas of the tax law should not be the subject of criminal prosecution. The Petitioners were denied due process of law when their expert witness who would have testified regarding the unsettled area of tax law regarding living trusts was refused permission to testify by the trial court. The court in United States v. Critzer, 498 F2d 1160, held that it was settled that where the law is vague or highly debatable, a defendant, actually, or imputedly, lacks the requisite intent to

violate the law. Because the Petitioners were denied the opportunity to present the evidence of the vague and unsettled nature of the law of trusts and tax related consequences of trusts (after Internal Revenue Service agents had previously testified regarding their opinion that clearly inferred that the law was settled in this regard) the Petitioners were denied due process of law in violation of the Fifth Amendment of the United States Constitution.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit, and Petitioners, while presently incarcerated, urge this Court to reverse the judgment and sentence imposed upon them.

Respectfully submitted,



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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1340
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WARD TRUMAN JONES,
JESSIE THOMAS JONES, and
JOE B. BLEDSOE,
Defendants-Appellants.

Appeal from the
United States District Court for the
Northern District of Texas

(January 28, 1986)

Before RUBIN, JOHNSON, and JONES,
Circuit Judges.

PER CURIAM:*

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Defendants, Ward Truman Jones ("Truman"), his brother, Jessie Thomas Jones, and his son-in-law, Joe B. Bledsoe, were charged in the first count of a sixteen-count indictment with conspiracy to defraud the United States by impeding, impairing, obstructing, and defeating the lawful functions of the IRS. 18 U.S.C. §371. Truman was also charged with fourteen substantive counts of wilfully aiding and assisting the preparation of a false tax return, 26 U.S.C. §7206(2) (Counts 2-15), and criminal contempt of court (18 U.S.C. §401(3) (Count 16). Jessie Jones was charged with seven substantive counts (Counts 4, 10-15) and Joe Bledsoe was charged with ten substantive counts (Counts 2-4, 7-9, 12-15).

Bledsoe and the Joneses, through their company, A.F.E., were in the business of selling intervivos trusts. An individual customer would come in and

have Truman explain the trust. Truman claimed that it was all legal. The trust would be set up with the customer and Truman as trustees. An individual would assign his paycheck, home, and all personal property to the trust. At tax time, the person would return to A.F.E. to have his tax returns filled out, usually under the direction of Joe Bledsoe. Both a Form 1040, personal return, and a Form 1041, trust return, would be filed. The trust would report all of its "income" and then deduct "expenses" such as the customer's depreciation on the house, utility bills, car payments, and other items that are not deductible by an individual. The trust also deducted management fees paid to the customer. Any money left over would be "distributed" to named distributees, usually close relatives of the customer, even though the money was

not actually distributed. On the individual return, the person's earnings on the W-2 forms would be reported as required. However, income would be "adjusted" by a large negative "nominee income" on line 20 of the return. This "nominee income" formed the basis for the substantive counts of the indictment.

The aim of all this manuevering was to reduce the individual's income tax. Not surprisingly, the IRS attacked the trust as a scam, and defendants' indictments followed. After a jury trial, all three defendants were found guilty of the conspiracy charge. Truman was found guilty on all fourteen substantive counts and the contempt charge. Jessie Jones was found guilty on Count 10 and not guilty on Counts 4, 11, 12, 13, 14, 15. Joe Bledsoe was found guilty on Counts 2-4, 7-9, and 12-15. Judgment was entered on the verdicts.

Defendants launch four contentions on appeal. First, defendants contend that their convictions violate the First Amendment's protection of free speech. This argument is frivolous. United States v. Daly, 756 F.2d 1076, 1081, (5th Cir.), cert. denied, ____U.S.____ (1985). Second, defendants contend that the evidence was insufficient to sustain their convictions. A review of the briefs and record in this case establish that defendants' argument is without merit. Third, the defendants contend that the trial court abused its discretion in excluding testimony of their "exper" witness. There was no abuse of discretion. Finally, defendants contend that the district court should have instructed the jury that "a tax return based on mistake or improper position alone is neither false nor fraudulent." The district court,

however, carefully instructed the jury on the meaning of "wilfulness." We find this instruction adequate. See United States v. Stanley, 765 F.2d 1224, 1236 (5th Cir. 1985). The judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1340

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WARD TRUMAN JONES,
JESSIE THOMAS JONES, and
JOE B. BLEDSOE,
Defendants-Appellants.

Appeal from the
United States District Court for the
Northern District of Texas

Before RUBIN, JOHNSON, and JONES,
Circuit Judges.

B Y T H E C O U R T :

IT IS ORDERED that appellants' motion for leave to file petition for rehearing out of time is GRANTED and, upon consideration, the petition for rehearing is DENIED.

ENTERED FOR THE COURT

s/ Johnson
UNITED STATES CIRCUIT JUDGE

2-26-86

Supreme Court, U.S.
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CLERK

(2)

No. 85-1873

In the Supreme Court of the United States

OCTOBER TERM, 1986

WARD TRUMAN JONES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the conduct that formed the basis for petitioners' convictions was protected by the First Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1873

WARD TRUMAN JONES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1986. A petition for rehearing was denied on February 26, 1986 (Pet. App. B1). The petition for a writ of certiorari was filed on May 14, 1986, and is therefore out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioners were convicted on one count of conspiracy to defraud the United States by impeding, impairing, obstructing, and defeating

the lawful functions of the Internal Revenue Service (IRS), in violation of 18 U.S.C. 371. Petitioner Ward Truman Jones (Truman) was also convicted on 14 counts of willfully aiding and assisting in the preparation and presentation of false tax returns, in violation of 26 U.S.C. 7206(2), and on one count of criminal contempt of court, in violation of 18 U.S.C. 401(3). Petitioner Jessie Jones (Jessie) was charged in seven of the aiding and assisting counts and convicted on one, and petitioner Joe Bledsoe was charged in and convicted on 10 of those counts. Pet. App. A2, A4. Truman was sentenced to 25 years' imprisonment, to be followed by two three-year periods of probation (R. 322-323, 326-327). Jessie and Bledsoe were each sentenced to five years' imprisonment (R. 324-325). The court of appeals affirmed (Pet. App. A1-A6).

1. The evidence at trial showed that between 1978 and 1981 petitioners, through their company (AFE), were in the business of selling *inter vivos* trusts. Truman represented to prospective customers that they could legally reduce their income taxes by assigning their property and earnings to such a trust. A customer would set up a trust with himself and Truman as the trustees, convey his home and personal property to the trust, and assign his wages or salary to the trust. Pet. App. A2-A3. The customer would continue to exercise complete control over his property and income, however; the trust would not direct his employment or spending and would not affect his lifestyle (II Tr. 543, 606).[1] Approximately 350 individuals purchased trusts from AFE for fees ranging between $1,500 and $3,500, plus fees for "maintenance" and tax return preparation (IV Tr. 969; VI Tr. 1201).

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[1]Transcript citations are taken from the government's brief in the court of appeals.

At tax time, accountants under Bledsoe's supervision would prepare individual (Form 1040) and trust (Form 1041) returns for customers, which Bledsoe personally reviewed (II Tr. 449, 451, 606; III Tr. 635-636, 654-655, 733-734, 737; IV Tr. 913, 916-917). All of the purported income of a customer's trust would be reported on his trust return, and deductions would be claimed for a variety of items that may not be deducted by an individual, such as depreciation on the customer's house, utility bills, and car payments. Management fees paid by the trust to the customer would also be deducted. Any remaining money would be reported as a distribution to named persons, usually close relatives of the customer, even though no money would actually have been distributed. On the customer's individual return, the earnings shown on his W-2 would be reported. But the income thus reported would be "adjusted" by a large negative amount styled "nominee income." This adjustment was the basis for the substantive counts of the indictment. Pet. App. A3-A4.

2. The court of appeals affirmed petitioners' convictions (Pet. App. A1-A6). The court of appeals summarily rejected petitioners' contentions that their convictions violated the Free Speech Clause of the First Amendment, that the evidence was insufficient to support the convictions, that the trial court erred in excluding testimony of a defense expert witness, and that the trial court's instructions were faulty (*id.* at A5-A6).

ARGUMENT

Relying on *United States* v. *Mallas*, 762 F.2d 361 (4th Cir. 1985), and *United States* v. *Dahlstrom*, 713 F.2d 1423, 1428 (9th Cir. 1983), cert. denied, 466 U.S. 980 (1984), petitioners contend (Pet. 9-12) that the tax law with respect to the validity of their trusts was unsettled and therefore that their advocacy of the trusts as a means of reducing

taxes was protected by the First Amendment. As the court of appeals held (Pet. App. A5), this contention is frivolous.

Assuming arguendo that *Mallas* and *Dahlstrom* were correctly decided, they lend no support to petitioners' claim. In *Mallas*, the court found that the question of the validity of a particular tax shelter was sufficiently unsettled that the defendants lacked the requisite criminal intent to be convicted of tax evasion. *Mallas* did not even address any First Amendment implications of vagueness or uncertainty in the law. In *Dahlstrom* the court also held that the shelter scheme involved there was not clearly illegal at the time the defendants entered into it and hence the requisite criminal intent was not shown. The court further noted that the First Amendment protected the defendants' advocacy of the shelter scheme unless it was directed at producing immediate lawless action (713 F.2d at 1428). These cases are inapposite here because in this case existing legal authority made it clear that petitioners' tax shelter scheme was invalid. And petitioners plainly have no entitlement to First Amendment protection because their conduct went well beyond mere advocacy and amounted to direct participation in the unlawful conduct. See *United States* v. *Little*, 753 F.2d 1420, 1433-1434 (9th Cir. 1984).

Long before the period that is the subject of this prosecution, this Court had repeatedly held that income is taxed to the person who earns it and that, for tax purposes, otherwise valid contractual arrangements are not effective to divert income from that person to another person or entity. See, *e.g.*, *United States* v. *Basye*, 410 U.S. 441, 449-450 (1973); *Harrison* v. *Schaffner*, 312 U.S. 579 (1941); *Helvering* v. *Horst*, 311 U.S. 112 (1940); *Lucas* v. *Earl*, 281 U.S. 111 (1930). In addition, both before and during this time period, numerous decisions of other courts and an IRS Revenue Ruling had held that trust arrangements similar to those involved here could not be used to avoid income tax.

See *Vnuk* v. *Commissioner*, 621 F.2d 1318 (8th Cir. 1980); *Horvat* v. *Commissioner*, 49 T.C.M. (P-H) para. 80,266 (1980); *Markosian* v. *Commissioner*, 73 T.C. 1235 (1980); *Wesenberg* v. *Commissioner*, 69 T.C. 1005 (1978); *Horvat* v. *Commissioner*, 46 T.C.M. (P-H) para. 77,104 (1977), aff'd, 582 F.2d 1282 (7th Cir. 1978), published at 671 F.2d 990 (1982), cert. denied, 440 U.S. 959 (1979); *Damm* v. *Commissioner*, 46 T.C.M. (P-H) para. 77,194 (1977); Rev. Rul. 75-257, 1975-2 C.B. 251.

Moreover, it was clear from the "grantor trust" provisions of the Internal Revenue Code, 26 U.S.C. 671-679, that petitioners' trust arrangements could not legitimately be used to avoid tax. Under these provisions, a grantor of a trust who has retained certain powers that may be exercised without the approval or consent of an adverse party is treated as the owner of the trust and is subject to tax on the trust's income. Given the complete control a purchaser of one of petitioners' trusts retained over his property and income, these provisions were clearly applicable and made the income assigned to the trust taxable to the individual. See, *e.g.*, *Vnuk* v. *Commissioner*, 621 F.2d at 1321. Thus, petitioners' claim of uncertainty in the tax law is totally without merit.[2]

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[2]For the same reason, there is no basis for petitioners' contention (Pet. 11, 12) that, because of uncertainty in the law, petitioners were not given fair notice of the requirements of the law and "necessarily lacked the requisite intent to violate the law." The record shows that petitioners were familiar with the relevant authorities. Copies of several of the decisions and the Revenue Ruling cited above were found in AFE's offices during a search in early 1983 (IV Tr. 954, 962; GXs 27-32). Also found in the offices were several newspaper articles reporting that trust arrangements like those promoted by petitioners had been rejected by the IRS as a valid method of reducing taxes (V Tr. 1080-1095; VI Tr. 1234-1235; GXs 34, 35, 39, 43, 45) and letters sent to Truman by attorneys advising that the trust promoted by petitioners could not be used as a legitimate means of tax avoidance (V Tr. 1111-1113; GXs 118, 119). Despite petitioners' awareness of the law, Truman told prospective customers they could rest assured that the trust petitioners sold was

Petitioners' attempt (Pet. 11-12) to characterize their conduct as mere advocacy protected by *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), is frivolous. Truman was appointed a trustee of the trusts set up by petitioners' customers, and petitioners provided tax return preparation services to their customers. These activities plainly involved participation in unlawful conduct, not simple advocacy. Consequently, they were not protected by the First Amendment. See, *e.g.*, *United States* v. *Holecek*, 739 F.2d 331, 334-335 (8th Cir. 1984), cert. denied, No. 84-5373 (Feb. 19, 1985); *United States* v. *Little*, *supra*; *United States* v. *Damon*, 676 F.2d 1060 (5th Cir. 1982).[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1986

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lawful and could not be challenged by the IRS, because it was just like trusts used by Bing Crosby, the Getty family, the Rockefellers, members of Congress, and Justices of the Supreme Court (V Tr. 747).

[3]Petitioners' brief contention (Pet. 12-13) that the trial court erred in not allowing them to present an expert witness to testify concerning the state of tax law was correctly rejected by the court of appeals. In light of the ample precedent establishing that their trust arrangement was not a legitimate means of tax avoidance, there can be little doubt that the trial court did not abuse its discretion in excluding such "expert" testimony.